FILE COPY
192

FILED
JUL 22 1946
CHARLES ELMORE CROPLEY
CLERK

744958
Supr. Ct.

IN THE

Supreme Court of the United States

OCTOBER TERM 1946.

No. 319

MANNIE & CO., A CORPORATION, MANUEL FEFFERMAN, MEYER FEFFERMAN AND ROSE FEFFERMAN, INDIVIDUALLY AND DOING BUSINESS AS MERCANTILE TRADING COMPANY,

Petitioners.

vs.

CHESTER A. BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION FOR AND ON BEHALF OF THE UNITED STATES,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

NICHOLAS J. PRITZKER,
STANFORD CLINTON,
134 No. La Salle Street,
Chicago, Illinois,
Attorneys for Petitioners.

THE DUNHORD-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Opinions below	2
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3-10
Reasons for granting the writ	11-38
Conclusion	39
Appendix	41

CITATIONS.

Cases.

Bowles v. Arlington Furniture Co., 146 F. (2d) 467 (7th Circuit)	26
Bowles v. Russell Packing Co., 140 F. (2d) 354	28
Bowles v. Simon, 145 F. (2d) 334	11
Hecht Co. v. Bowles, 321 U. S. 21, 88 L. ed. 754	26
U. S. Gypsum Co. v. Brown, Price Administrator, 137 F. (2d) 803	14

Statutes Cited.

Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C. A. App. 1942, as amended (Pub. law No. 729, 77th Cong., 2nd Sess., C. 589)	3, 41
Section 902 (a)	41
Section 902 (h)	41
Section 904 (a)	41
Section 925 (a)	41
Section 925 (e)	42

Administrative Regulations Cited.

Revised Price Schedule 35, 6 Fed. Reg. 5335, et seq....3, 12
Revised Price Schedule 89, 7 Fed. Reg. 715, et seq.....3, 12
Maximum Price Regulation 118, 7 Fed. Reg. 3038, et seq. 3, 12
Maximum Price Regulation 127, 7 Fed. Reg. 3119, et seq. 3, 13, 22
General Maximum Price Regulations, 7 Fed. Reg. 3153, et seq. 3, 23, 24

Other Authorities Cited.

Excerpt from the Transcript of Hearings before the Committee on Banking and Currency of the House of Representatives on HR 5479 (superseded by HR 5990) 77th Cong., 1st Sess. (1941) pp. 982, 1829. 14
88 Cong. Rec., Jan. 8, 1942 at 105..... 14
88 Cong. Rec., Jan. 8, 1942 at 108..... 14
88 Cong. Rec., Jan. 8, 1942 at 119..... 14

IN THE

Supreme Court of the United States

OCTOBER TERM 1946.

No. .....

MANNIE & CO., A CORPORATION, MANUEL FEFFERMAN, MEYER FEFFERMAN AND ROSE FEFFERMAN, INDIVIDUALLY AND DOING BUSINESS AS MERCANTILE TRADING COMPANY,

Petitioners.

vs.

CHESTER A. BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION FOR AND ON BEHALF OF THE UNITED STATES,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Mannie & Co., a corporation, Manuel Fefferman, Meyer Fefferman and Rose Fefferman, individually and doing business as Mercantile Trading Company respectfully pray the issuance of a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered on March 13, 1946 affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division.

Opinions Below.

The District Court filed no opinion. The opinion in the Circuit Court of Appeals (T. 182-191) is reported at 155 F. (2d) 129.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on March 13, 1946 (T. 192). A petition for rehearing was denied on April 22, 1946 (T. 193).

Questions Presented.

1. Were the sales from Mercantile to Mannie and from Mannie to Texcott in performance of a recognized distributive function?

2. Is Texcott a wholesaler or a retailer within the meaning of GMPR?

3. On the facts presented by the record, was the issuance of an injunction against the petitioners an abuse of discretion?

Statute Involved.

The pertinent provisions of the Emergency Price Control Act of 1942 are set forth in the Appendix.

STATEMENT.

This action was brought pursuant to provisions 205(a) and 205(e) of the Emergency Price Control Act of 1942 (56 Stat. 23; 50 U.S.C.A. App. Sec. 901—1942) as amended (Pub. law No. 729, 77th Cong., 2nd Sess. C. 589), which Act as amended will be referred to as the "Act". The complaint specifically charges violations of Revised Price Schedule 35, effective October 21, 1941 (6 Fed. Reg. 5335 *et seq.*), Revised Price Schedule 89 effective February 2, 1942 (7 Fed. Reg. 715 *et seq.*), Maximum Price Regulation 118, effective May 4, 1942 (7 Fed. Reg. 3038 *et seq.*), Maximum Price Regulation 127, effective May 4, 1942 (7 Fed. Reg. 3119 *et seq.*), and the General Maximum Price Regulations, effective May 11, 1942 (7 Fed. Reg. 3153 *et seq.*),[1] which regulations were promulgated and made effective pursuant to the terms and provisions of Sections 206 and 2(a) of the Act. Revised Price Schedule 35 fixes prices for sales of blue denim. Revised Price Schedule 89 fixes prices for bed linens. Maximum Price Regulation 118 fixes prices for unbleached duck. Maximum Price Regulation 127 fixes prices for bleached duck. It is conceded that GMPR applies to the commodities handled by the defendants where no other specific regulation controls. (Sections 1499.9 and 1499.21, GMPR.)

Count 1, pursuant to Section 205(e) of the Act, asked damages for three times the amount by which the price of the commodities involved exceeded the maximum prices established by the various regulations allegedly applicable to the commodities involved; and Count 2, pursuant to Sec. 205(a) of the Act, asked for an injunction to compel

1. These regulations will be referred to as RPS 35, RPS, 89, MPR 118, MPR 127 and GMPR.

future compliance with the record keeping and invoicing requirements of the regulations involved and to enjoin the continuance of the alleged violations.[2]

Because of the novelty of the issues involved, the respondent moved for a separate trial of the equitable issues contained in Count 2. The parties entered into a stipulation for the entry of an order for the continuance of the question of damages contained in Count 1 "until a final adjudication, including the exhaustion of all rights of appeal and review shall be had upon the equitable issues set forth in Count 2". This was done, as the stipulation recited, "in order to minimize the cost of preparation for trial and to conserve the time of the parties and because the issue of the applicability of the regulations of the Office of Price Administration . . . must first be determined." (T. 21.)

Upon the presentation of the motion and the stipulation to the Trial Judge, a separate trial of the equitable issues contained in Count 2 was ordered. (T. 22.) Upon the trial the equitable issues contained in Count 2 were found in favor of the respondent. Findings of Fact, Conclusions of Law and order consonant with the Court's conclusions were duly entered. (T. 128-141). Upon appeal the Circuit Court of Appeals on March 13, 1946 affirmed the judgment of the District Court (T. 192). The opinion of the Circuit Court of Appeals (T. 182-191) is reported at 155 F. (2d) 129.

Both the Mercantile Trading Company and Mannie & Company are engaged in the purchase and sale of a

2. The original complaint alleged violations of GMPR only against Mannie & Co. (T. 6, 8-9) On April 12, 1945, almost two months after the taking of evidence had been concluded, the respondent was permitted, over objection, to amend the complaint charging the remaining petitioners with violating GMPR. (T. 23, 126-127) The objection to the order allowing the amendment will be argued here.

great variety of merchandise, including cotton textiles. (T. 3, 12, 24)

Mercantile Trading Company[3] is a partnership consisting of Meyer Fefferman and Manuel Fefferman, brothers, and their mother, Rose Fefferman.[4] The company has been in existence ten years, Meyer Fefferman being the sole owner prior to 1943, at which time Manuel Fefferman, who had previously been employed by the company, and Rose Fefferman became his partners. (T. 35)

Mercantile has an office and warehouse at 2438 South Michigan Avenue, Chicago, Illinois where stock is kept and from which shipments are made. (T. 35-36) Mercantile has always sold merchandise to a general trade, including manufacturers, other wholesalers or jobbers, and directly to consumers. (T. 45) Among Mercantile's consumer purchasers were private and public institutions in Chicago and Cook County. The company made no sales to institutions outside Chicago and Cook County. (T. 37, 102) Mercantile's prices for merchandise were the same as to all classes of customers. (T. 49) During the years 1941 and 1942 Mercantile's annual gross volume of business was less than $750,000.00. (T. 37)[5]

After the issuance of the GMPR, Mercantile established maximum prices for textiles handled by the company on the

3. The partnership will be referred to as "Mercantile."

4. Rose Fefferman was not designated in the complaint as one of the partners. (T. 2) During the course of the trial the parties agreed that the complaint be amended to include her. Her appearance was entered and it was agreed that the answer which had been filed stand as her answer to the complaint. (T. 28-29)

5. There is no specific evidence as to the volume of business done by Mannie, but since Mannie purchased virtually all of its merchandise from Mercantile (T. 66, 86) and Mannie's purchases were only a portion of Mercantile's business, it is reasonable to assume that Mannie's annual volume was substantially less than Mercantile's.

basis of sales and deliveries made in March, 1942 to Cook County annd City of Chicago institutions. (T. 38, 50-51) All of Mercantile's sales have been at or lower than the GMPR selling prices. (T. 45.)

Mannie & Company[6] is a corporation which was formed in April, 1941. Its principal owner is Etta Fefferman, wife of Manuel Fefferman. Etta Fefferman had some money and wanted to go into business. Manuel Fefferman told her that if she set up a mail order business, Mercantile would undertake to supply and store merchandise for the orders obtained by Mannie. Etta Fefferman invested $1500.00 of her own funds in the corporation. (T. 85-86) Manuel, Meyer and Rose Fefferman at no time had any financial interest in the corporation but Manuel Fefferman did look after his wife's interests. (T. 76, 84)

Mannie has offices at 120 South La Salle Street, Chicago, Illinois, where samples are carried and orders by mail, telephone or in person are received. (T. 66) These orders are shipped by Mercantile, according to instructions received by Mannie from the customers and communicated to Mercantile. (T. 67, 111)

From the time that Mannie first commenced doing business, which was about a year prior to the adoption of the Act, Mannie purchased virtually all of its merchandise from Mercantile (T. 66, 86) and sold the merchandise to "anybody" who would buy, including manufacturers, wholesalers or jobbers, and public and private institutions throughout the United States. The larger part, probably two-thirds, is sold to public or private institutions, but Mannie does not compete with Mercantile inasmuch as none of Mannie's sales is to institutions in Chicago or Cook County. (T. 102) Among Mannie's

6. The corporation will be referred to as "Mannie."

customers was Texcott and Company (Respondent's Exhibits 11-17, inclusive), which made sales to public and private institutions. (T. 80)[7] Mannie prices for merchandise have always been the same as to all classes of customers. (T. 107-108.)

Prior to the adoption of the Act and the issuance of the GMPR, Mannie made an offering to its trade and prospective customers of a list of items at specified prices for March, April and May, 1942. This list was introduced in evidence as Respondent's Exhibit 1. The list was mailed in either February or March of 1942. (T. 70)

After the GMPR was issued, Mannie adopted the prices on this list as its maximum prices under GMPR. Mannie made only four deliveries of cotton textiles in March, 1942 (Exhibits 18-21, inclusive). The date that the goods covered by these four exhibits were sold is not established by the record.[8] Exhibit 18 is a sales invoice to a state hospital of the State of Georgia of Hickory shirting at .3098 cents per yard. Petitioner Mannie's offering price for this item (Respondent's Exhibit 1) has been .364 cents per yard. (T. 71-72) Exhibit 19 is a sales invoice to a reformatory of the State of Indiana of twill at .425 cents per yard. Petitioner Mannie's offering price for this item (Respondent's Exhibit 1) has been .435 cents per yard. (T. 72) Exhibit 20 is a sales invoice to a public institution of the State of Georgia of bleached sheeting at .2375 cents per yard. Petitioner Mannie's offering price for this item (Respondent's Exhibit 1) has been .285[9] cents per yard.

---

7. The transactions between Mannie and Texcott and Company give rise to one of the principal questions of the case.

8. On direct examination by counsel for respondent, Manuel Fefferman testified that the sales might have been made "two or three months prior" to the date of the deliveries. (T. 74)

9. Manuel Fefferman testified that he could not recall whether Item 116 or 118 on his base period list applied. (T. 73)

(T. 72-73) Respondent's Exhibit 21 is a sales invoice to a training school for girls in the State of Georgia of heavy unbleached sheeting at .459 cents per yard. Petitioner Mannie's offering price for this item (Respondent's Exhibit 1) has been .44 cents per yard. (T. 73)

In September, 1943, an investigator checked the records of Mannie and subsequently upon request Manuel Fefferman consulted with Miss Banahan, an attorney in the Metropolitan OPA Office in Chicago. He explained to her how he had established his prices under the GMPR and was told to continue to operate as he had. (T. 94-95)

In February, 1944, Mr. Cyrus Walker, an investigator from the OPA Office, checked the records, first of Mannie and then of Mercantile. He advised Manuel Fefferman, after checking Mannie's records, that Regulation 127 had been violated. (T. 95)

He checked the records at Mercantile for several days and explained afterward to Meyer Fefferman that Mercantile had violated Regulation 127 (T. 115), enumerating several items including blue denim and chambray, which he said were subject to that regulation. (T. 119) He also explained that the mark-up allowed by the regulation could be divided between Mercantile and Mannie as long as the permitted mark-up was not exceeded. (T. 116) He stated that bedsheets were a commodity item under GMPR (T. 116), and stated that Regulation 118 was a manufacturer's regulation and did not apply to Mercantile. (T. 117)

Immediately Meyer Fefferman and Manuel Fefferman went to the office of Mrs. Katherine Johnson, an attorney in the Office of Price Administration, to make inquiry. Mrs. Johnson had not yet had Mr. Walker's report, but did say to them that they should not lose too much sleep about it, and that many people never heard of Regulation 127. (T. 117)

Later Manuel Fefferman was told by Mrs. Johnson that all textile items including denim came under Regulation 127. (T. 105) Subsequent to that time Meyer Fefferman priced the items enumerated by Mr. Walker, even those which he later learned were not covered by 127, according to the instructions for pricing which Mr. Walker gave him. (T. 119, 120)

Meyer Fefferman learned for the first time from Miss Rosen, an Office of Price Administration investigator, in April or May of 1944, that the OPA's position was that Mercantile was under 118, because it was asserted that textiles sold to Mannie were not advanced in distribution, and that Mercantile was not permitted to charge a mark-up under 127, as Mr. Walker had advised. (T. 118)

After this, Manuel Fefferman went to Washington, where a Mr. McMahon had an interview with Mr. Lundeen from the Enforcement Office, Mr. Caron from the Office of Administration, and a Mr. Walsh. Manuel Fefferman was told all he was to do in straightening out the matter was to have Mercantile charge a commission for doing the buying. When he came back his attorney advised him to wait until the Court ruled on the matter and told him what to do. (T. 88)

Respondent's Exhibits 2, 3 and 11 show the sales respectively of 5602½ yards of blue denim by Weinkle & Company to Mercantile at 21½¢; by Mercantile to Mannie at 23½¢; and by Mannie to the Texcott Company at 25½¢ in September of 1943. Respondent's Exhibits 4 and 5 are sales invoices for blue denim 2.00 at 29¢ sold by Mercantile to Mannie on October 6, 1944. Respondent's Exhibit 6 is an invoice for the purchase of 5050 yards of 42 inch bleached sheeting, 70 x 74, by Mercantile from the Tilton Textile Corporation, at 25¢ a yard. Respondent's Exhibit 7 is a sales invoice for this sheeting by Mercantile to

Mannie at 32½¢ a yard. Respondent's Exhibits 12, 13 and 14 are invoices for the sale of some of the sheeting by Mannie to Texcott Company at 34½¢ a yard. All of the transactions referred to in Exhibits 6, 7, 12, 13 and 14 occurred in December, 1943. Respondent's Exhibits 8 and 15 refer to sales in November, 1943 of 1025¼ yards of bleached duck by Mercantile to Mannie and by Mannie to the Texcott Company, at prices of 44.8¢ and 46¢ a yard respectively. Respondent's Exhibits 9 and 17 refer to the sale of 1070¾ yards of unbleached duck by Mercantile to Mannie and by Mannie to Texcott at prices of 39½¢ and 42¢ a yard respectively, in September, 1943. Respondent's Exhibit 10 refers to the sale of 989¾ yards of bleached duck by Mercantile to Mannie at 44.8¢ a yard, in September, 1943.

REASONS FOR GRANTING THE WRIT.

I.

The paramount question presented is whether or not the sales of cotton textiles from Mercantile to Mannie and from Mannie to Texcott were in the performance of a recognized distributive function. The case is one of first impression. Both the Trial Court (T. 132, 133) and the Circuit Court of Appeals (T. 182-191) agreed with the contention of the respondent that they were not.[10] However, it should be noted that the Courts are not bound to accept the respondent's interpretation of the regulations.[11]

---

10. It should be emphasized that the petitioners do not here challenge the validity of the regulations involved.

11. In *Bowles* v. *Simon*, 145 F. (2d) 334, the Seventh Circuit Court of Appeals, in a case involving an interpretation of rent regulations, made the following statements in its opinion: (page 337)

> "In his brief, counsel for the Administrator says: 'These administrative rulings or interpretations are controlling. Even in the case of a statute, the construction placed upon it by the agency charged with its administration is given great weight by the courts . . . and where the document interpreted is the agency's own regulation, almost conclusive effect is given to the administrative interpretation.'
>
> "We think counsel's zeal and enthusiasm for the sanctity of such interpretations are hardly warranted. This doctrine would relegate the statutes of Congress to an inferior position unjustified even in these times when the compulsion of an emergency compels us to clothe administrative agencies with extraordinary powers.
>
> "We do not accept the Administrator's view that he may promulgate a regulation and then place on it an interpretation which becomes controlling on the courts. The Administrator has not grown to any such stature. The courts may consider his interpretations and follow them, if correct, but the court is not bound to follow them. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 325, 53 S. Ct.

The issue of what constitutes "performance of a recognized distributive function" arises by virtue of the language contained in RPS 35, RPS 89, MPR 118 and MPR 127. The pertinent provisions of these regulations are as follows:

1. Section 1316.51 (b) of RPS 35, which fixes the prices of blue denim, provides that "* * * the provisions of Price Schedule No. 35 are not applicable to sales or deliveries of cotton goods made by any wholesaler, jobber or retailer in the performance of a recognized distributive function."[12] No definition, explanation or construction of the language "in performance of a recognized distributive function" is given.
2. Section 1316.101 (b) of RPS 89, which fixes the prices for bed linens, recites that "the provisions of Revised Price Schedule No. 89 are not applicable: (1) to sales or deliveries of bed linens made by any wholesaler, jobber or retailer in the performance of a recognized distributive function." Again there is no definition, explanation or construction of the language "in the performance of a recognized distributive function."
3. Section 1400.104 of MPR 118, which fixes the prices for unbleached duck, provides "the provisions of this Maximum Price Regulation No. 118 are not applicable: (a) to sales and deliveries of cotton products in the performance of a recognized distributive function by any wholesaler, jobber or retailer * * *" Footnote 9

350, 77 L. ed. 796; *Bowles* v. *Nu Way Laundry Company*, 10 Cir., 144 F. (2d) 741.

"We think the District Court had a right to determine the meaning of these regulations for itself, although it could not, and did not, undertake to pass upon their validity, since that authority resides in the Emergency Court of Appeals and in the Supreme Court. Section 204, Emergency Price Control Act 1942, 50 U. S. C. A. Appendix, Sec. 924. Having made its own interpretation, the District Court was justified in rejecting the Administrator's interpretation of these regulations."

12. In discussing this and the other regulations involved, reservations or exceptions not here in question are omitted.

referring to this provision recites that "no sale is made in the performance of a recognized distributive function within the meaning of this Maximum Price Regulation No. 118 unless it advances the goods to the next stage of distribution. Presumptively, sales by one jobber to another, or by one manufacturer to another, engaged in the same type of business, are not sales in the performance of a recognized distributive function."

4. Section 1400.82(i) (1) of MPR 127, which fixes the prices for bleached duck, provides that "* * * the maximum price for finished piece goods sold in the performance of a recognized distributive function by a wholesaler, jobber or converter-jobber selling job goods shall be computed by dividing the actual cost by .83 if the sale is to a Class II purchaser and by dividing the actual cost by .88 if the sale is to a Class I purchaser * * *"[13] Footnote 20 referring to this provision recites "No sale is made 'in the performance of a recognized distributive function' within the meaning of this Maximum Price Regulation No. 127 unless it advances the goods sold to the next stage of distribution."

It is earnestly submitted that the express language of the Act and the reasonable constructions of the regulations involved are not in accord with the judgment below. In the first place, Section 902(h) of the Act provides as follows:

> "The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, or changes in established rental practices, except where such action is affirmatively found by the Administrator to be necessary to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act."

13. In order not to digress, discussion of the questions arising because of the classification of purchasers under MPR 127 will be undertaken later.

The background of this section is compactly reviewed in the decision of the United States Emergency Court of Appeals in the case of *U. S. Gypsum Co.* v. *Brown, Price Administrator,* 137 F. (2d) 803, 808:

> "An analysis of the legislative history of this Section discloses that the Section was originally added to the Bill proposed by the House Committee on Banking and Currency, at the suggestion of advertising interests, which feared that the authority of the Administrator might be used to curtail advertising expenditures on the theory that they contributed to rising prices.[14] As consideration of the subject developed, the Section was altered in the House Bill to include 'business practices or cost practices, means or aids to distribution (such as advertising).'[15] The Price Control Bill reported by the Senate Committee on Banking and Currency did not contain a similar section because, as stated by Senator Taft, a member of the Committee, '* * * it did not think the bill gave * * * the power to interfere with any such practices.'[16] The Section was added to the Senate Bill on the floor of the Senate at the suggestion of Senator Vandenberg, who stated that it was 'simply an effort to make sure that the authority granted in *the bill does not permit the price controller to reach down into the business practice of an institution and undertake to revamp it.*'[17] (Italics ours.)
>
> "At another point, Senator Vandenberg stated that: 'The sole purpose of the amendment, Mr. President, is to make sure that the bill is simply a price-control bill, and not a business management-control bill. * * *'[18]

14. Excerpts from transcript of hearings before the Committee on Banking and Currency of the House of Representatives on H. R. 5479 (superseded by H. R. 5990) 77th Congress, 1st Session (1941) pp. 982, 1829; 88 Cong. Rec., Jan. 8, 1942, at 105.

15. House Report No. 1409, 77th Congress, 1st Session (1941) p. 7.

16. 88 Cong. Rec. Jan. 8, 1942, at 105.

17. 88 Cong. Rec. Jan. 8, 1942, at 108.

18. 88 Cong. Rec. Jan. 8, 1942, at 119.

"The Congressional Record shows that Senator Brown, who sponsored the Bill through the United States Senate and who now is the Price Administrator, agreed with the interpretation of Senator Vandenberg and acquiesced in the adoption of the Section."

The effect of the Trial Court's judgment that Mercantile's sales to Mannie and Mannie's sales to Texcott were not in the performance of a recognized distributive function is to deprive the petitioners of a wholesaler's mark-up to which they would otherwise be entitled.[19] In other words, petitioners' sales of blue denim, bed linens, bleached ducks and unbleached duck under the provisions of RPS 35, RPS 89, MPR 118 and MPR 127, respectively, would have to be made at the manufacturer's ceiling prices. This would follow because unless a wholesaler's sales are in the performance of a recognized distributive function, no mark-up is provided by these regulations.[20] In consequence, the

19. The evidence discloses that both Mercantile and Mannie sold to anybody who would buy, including manufacturers, wholesalers, retailers and consumers. (T. 37, 45, 101-102) However, with respect to the transactions upon which the respondent relies here, it is conceded that both Mercantile and Mannie were making wholesale sales. It is to be emphasized, however, that there is an issue between the parties with reference to the proper classification of Texcott. The respondent contends that Texcott acted as a wholesaler and that Mannie in making the sales to Texcott did not perform a recognized distributive function. Petitioner Mannie contends that even if Texcott were a wholesaler, Mannie performed a recognized distributive function. Mannie further contends, however, that Texcott was actually a retailer and not a wholesaler. If Texcott were a retailer rather than a wholesaler, the respondent would concede that Mannie's sales to Texcott were in the performance of a recognized distributive function. (T. 52) The point will be argued later in the petition.

20. In cases where the wholesaler's sales of the textiles here involved are in the performance of a recognized distributive function, the situation would be this:

1. The wholesaler's ceiling price is established by the GMPR except as to textiles covered by MPR 127.

2. As to any textiles subject to MPR 127, the wholesaler's ceiling price is established by that regulation.

The special provisions of MPR 127 will be discussed later in the brief.

petitioners would not be allowed a profit of any kind, not even enough to cover their overhead.[21] Indeed, Mercantile having sold to Mannie at a profit, Mannie would presumably have to sell below cost and take a loss in order to sell at the manufacturer's ceiling price.[22]

The short of it is that the respondent's interpretation of the regulations here involved absolutely and clearly disrupts petitioners' long established manner of doing business. More than that, it has exposed the petitioners to the claims of treble damages set forth in Count 1 of the complaint for carrying on their business after the adoption of the Act exactly as they did before. We submit in the very fullest sense of the words the respondent has violated the Act in that he has reached "down into the business practice of an institution" and undertaken "to revamp it."

It is uncontroverted that the petitioner Mercantile had carried on business, making sales to other wholesalers, manufacturers, retailers, private, and public institutions, and anybody who would buy, without making any distinction as to price for different kinds of buyers (T. 37, 45, 49) for approximately ten years prior to the adoption of the Act. (T. 44) The same is true as to Mannie for the entire period of its existence, (T. 101, 107) which commenced about a year prior to the Act. (T. 85) Moreover, the

21. Counsel for respondent pointedly asked this question of Meyer Fefferman upon the trial:

"Q. Did Mercantile Trading Company make a profit on these transactions?

A. They certainly did." (T. 43)

And to the same effect is the following excerpt from the examination of Manuel Fefferman by counsel for the respondent:

"Q. Did Mannie & Co. * * * always sell at a price in excess of its cost?

A. Well, they naturally would." (T. 69)

22. It is assumed, of course, that in a scarce goods market a manufacturer would ordinarily sell at ceiling.

manner of dealings between Mannie and Mercantile, whereby Mercantile bought and stored the great bulk of the goods purchased by Mannie, was the basis upon which the business of Mannie was organized and was put into effect from the day that Mannie commenced doing business. (T. 67, 85-86) Obviously, no suggestion can be made, and none is made, that the petitioners adopted these methods of doing business for the purpose of evasion or subterfuge to circumvent the objects and purposes of the Act.

The respondent's conclusion that the sales here in question were not in the performance of a recognized distributive function are especially vulnerable to criticism in that the language of the regulations is so vague, indefinite and uncertain that no objective standard or test is provided for the determination of their meaning and application.

As we have pointed out above, RPS 35 and RPS 89 provide no interpretation or explanation whatever as to what constitutes performance of a recognized distributive function. MPR 118 and MPR 127 both provide that no sale is made in the performance of a recognized distributive function, within the meaning of the regulations, unless the sale advances the goods sold to the next stage of distribution. In addition, MPR 118 provides that presumptively sales by one jobber to another are not sales in the performance of a recognized distributive function. No explanation or standard is given as to what constitutes the next stage of distribution, nor is any light thrown on what is necessary to overcome the presumption that transactions between jobbers are not in performance of a recognized distributive function. Thus it is seen that it is not possible within the context of the regulations to determine by any objective test or by the application of any concrete standard whether particular transactions between jobbers are in performance of a recognized dis-

tributive function. Our position is that whatever this language may mean, it cannot sensibly, intelligently or equitably mean that the petitioners, whose business practices and organizations were established in accordance with what seemed economically sound and advantageous to them at a time when they never dreamed there would be an Emergency Price Control Act, are to be required to discontinue the type of sales here in question.

The mystery of what in the view of the respondent constitutes a recognized distributive function deepens when viewed in the light of express language contained in MPR 118 and MPR 127.[24] These two regulations clearly imply that jobber to jobber transactions may be in performance of a recognized distributive function. Thus, the footnote to Section 1400.104(a) of MPR 118 which requires the advancement of goods to the next stage of distribution, states that jobber to jobber sales are only *presumptively* not in the performance of a recognized distributive function. From this we take it that there are jobber to jobber sales which are in the performance of a recognized distributive function and advance goods to the next stage of distribution.

The evidence is even clearer as to MPR 127. Footnote 20 to Section 1400.82(i)(1) requires advancement of goods to the next stage of distribution for a sale to be in the performance of a recognized distributive function. The section to which this footnote refers specifically provides for sales by a wholesaler or jobber in the performance of a recognized distributive function to either Class I or Class II purchasers. Section 1400.81(a)(3), which enumerates Class I purchasers, specifically includes whole-

24. So far as the express language of RPS 35 and RPS 89 is concerned, it is conceivable that the respondent could conclude that no jobber to jobber transaction is in the performance of a recognized distributive function.

salers, excepting certain types of wholesalers enumerated in Section 1400.81(a)(4), as Class II purchasers.

Moreover, the mark-up which is permitted to wholesalers by the express language of Section 1400.82(i)(1) is followed by Section 1400.82(i)(2) which specifically lists certain wholesale transactions to which the mark-up does not apply, but *does not include in this list wholesaler to wholesaler transactions.* Therefore, it is perfectly clear that MPR 118 and MPR 127 specifically contemplate and recognize that jobber to jobber transactions can be in performance of a recognized distributive function in that they advance the goods to the next stage of distribution. When they are not is not at all clear. It is unreasonable to suppose that established methods of doing business which came into existence at a time when the regulations were unknown and unthought of can be so adjudged.

The position of the respondent becomes even more confusing when the testimony of Charles Whitlo, an OPA economist, is considered.[25] After testifying that the "orthodox" distribution of goods normally passed through four stages, that is, the manufacturer, the wholesaler, the retailer and the consumer,[26] Mr. Whitlo made the following points (T. 52):

25. Mr. Whitlo's testimony was entirely general. (T. 51-63) He did not claim to be a skilled technician or an expert in the marketing channels of all isolated types of commodities, nor did he claim to be an expert on the marketing of textiles. (T. 60) He did not claim to have investigated the operations of the petitioners and did not attempt to express an opinoin as to whether or not the sales here in question were in the performance of a recognized distributive function or that they injured the price control program.

26. Respondent unquestionably had authority under the Act to promulgate regulations formally establishing and defining various stages of distribution. Respondent could have further provided by regulation that no profit or mark-up of any kind could be charged in jobber to jobber transactions or that such mark-up could be made in specifically enumerated and clearly described ex-

1. In the distribution of goods anything is possible (T. 59) and that in exceptional cases of jobber to jobber transactions there was nothing of necessity suspicious or wrong about them and "they may have a sound economic basis." (T. 60)
2. There are jobber to jobber transactions which are in the performance of a recognized distributive function and advance goods to the next stage of distribution.[27] (T. 53)
3. If two jobbers divided a permitted mark-up there would be no effect at all upon the price control program. (T. 55)

On the basis of Mr. Whitlo's testimony, it is apparent that what constitutes the next stage of distribution and the performance of a recognized distributive function can mean all things to all men. We submit most earnestly that so far as Mr. Whitlo's expert testimony is concerned, there is no justification for concluding that the petitioners' established manner of doing business requires discontinuance in order to control inflation.

---

ceptional cases. Any challenge as to the validity of such regulations could then be made in the Emergency Court of Appeals. The respondent, however, did not adopt any such regulations. He left the individual jobber to guess whether particular jobber to jobber sales advanced the goods to the next stage of distribution and were therefore in performance of a recognized distributive function.

27. The following examples were given by Mr. Whitlo:

1. A large metropolitan wholesaler selling to a small jobber in the far western states. (T. 53)
2. Large metropolitan jobbers who parcel out products to intermediate single jobbers "who serve as small isolated accounts." (T. 59)
3. General wholesalers making purchases from specialized wholesalers. (T. 61-62)
4. Accommodation transactions between jobbers. (T. 56)

The Court's attention is called to the fact that one of the defendants' witnesses, P. H. Stoneham, an employee of Carson, Pirie, Scott & Co. for thirty-seven years and in charge of the contracting division, testified that Carson, Pirie, Scott & Co. sold merchandise to 50 to 100 wholesalers, among them Mercantile Trading Company. (T. 112-113)

The position of the petitioners that the sales in question were in performance of a recognized distributive function is given further support by various interpretive bulletins issued by the respondent. On August 6, 1942, the respondent issued an interpretive bulletin on textiles which contains the following statement:

> "A sale by one jobber to another is, generally, subject to the Regulation, since such a sale is presumptively not in the performance of a recognized distributive function. A jobber to jobber sale may be in the performance of a recognized distributive function, where the buying jobber is not a competitor of the selling jobber in the same line of goods, and if the buying jobber has, in the normal course of his business, previously bought goods from jobbers of the same class as the seller." (RPI 11)[28]

The evidence is clear that Mannie is not a competitor of Mercantile in the same line of goods. (T. 102) As a matter of fact, under the arrangements which existed, Mercantile acted as the source of supply and as the warehouse for Mannie. (T. 67, 85) Moreover, Mercantile sold private and public institutions in Cook County, but not elsewhere. (T. 37) Mannie sold private and public institutions elsewhere than in Cook County. (T. 102) So far as the regulation that the buying jobber in the ordinary course of his business previously bought goods from jobbers in the same class as the seller, we not only say that Mannie previously bought not only from the same class as Mercantile, but from Mercantile. The respondent further recognizes that there could be jobber to jobber transactions in the interpretive bulletin regarding textiles issued on October 15, 1942, which reads as follows:

---

28. RPI means "Recent Price Interpretations." These opinions were published in mimeographed form only by the OPA Administrator.

"The following sales are usually in the performance of a recognized distributive function: Sales by a prime jobber to an institutional jobber; an institutional jobber to an institution; and by an importer to another wholesaler." (RPI 14)

Subsequent sanction of jobber to jobber transactions on items under MPR 127 is recognized in another interpretive bulletin issued August 6, 1942, which states:

"In sales to Class II purchasers through two jobbers the 17 per cent mark-up may not be divided in any ratio the jobbers desire, since the first jobber's mark-up may not exceed 12 percent. A jobber who buys from a converter has a specific maximum price (12% mark-up) in sales to Class I purchasers and a higher maximum price (17% mark-up) for sales to Class II purchasers. Because jobbers are Class I purchasers, the first jobber selling to a second jobber may take no greater mark-up than 12 percent. If the first jobber took the full 12 percent mark-up, then the second jobber could charge no mark-up whatever on a sale to a Class I purchaser, and he could charge a Class II purchaser no higher price than the first jobber might have charged the same purchaser." (RPI 11)

The foregoing language clearly contemplates jobber to jobber transactions and the division of mark-up depending on whether the sales are to Class I or Class II purchasers.

It is obvious, therefore, that what constitutes the performance of a recognized distributive function because goods are moved from one stage of distribution to the next is a very flexible and variable concept. No clear and precise definitions or objective standards are provided for determining just when a recognized distributive function is performed and when it is not. But one thing is clear—as the OPA economist, Mr. Whitlo, testified, in the distri-

bution of goods "anything is possible" and wholesaler to wholesaler transactions may have a sound economic basis. Another thing is certain and that is that the respondent himself, without illustration or explanation, has clearly recognized in his regulations that wholesaler to wholesaler transactions are not of necessity at odds with the price control program, and that in such cases the wholesaler making the sale is entitled to either his GMPR or MPR 127 mark-up. In consequence, we respectfully urge that a consideration of the regulations and their interpretations by the respondent with due regard to settled business practices, compels the conclusion that the transactions here in question were in the performance of a recognized distributive function.

II.

The second question presented by this petition is Mannie's sales to the Texcott Company. Respondent contends that Texcott is a jobber within the meaning of the applicable regulations. Even if this were so, as we have pointed out above, Mannie's sales to Texcott were in performance of a recognized distributive function. However, the case of Mannie is *a fortiori,* in that Texcott is clearly a retailer and not a wholesaler. The respondent contends that Texcott was a wholesaler under GMPR because it sold to private and public institutions. (T. 92, 93) Not only does the respondent's case fail to adequately trace specific goods from Mannie through Texcott to any private or public institution, but even if the record were sufficient in that respect, it is very plain that such sales are retail and not wholesale transactions. In order to determine the question it is necessary to consider the relevant provisions of GMPR. Section 1499.20(p) of GMPR defines a sale at wholesale as follows:

> "'Sale at wholesale' means a sale by a person who buys a commodity and resells it, without substantially changing its form, to any person other than the ultimate consumer, except that, for the purposes of Section 1499.3 of this General Maximum Price Regulation, a sale at wholesale shall include any sale by such person to an industrial or commercial user."

An institution is certainly an ultimate consumer and not an industrial or commercial user. But the GMPR goes even further in making it clear that a sale to an institution is a sale at retail. Section 1499.20(o) *specifically exempts sales to institutions from being regarded as retail sales in two respects, but in two respects only.* This Section is as follows:

> "'Sales at retail' or 'selling at retail' means a sale or selling to an ultimate consumer other than an industrial or commercial user except that . . . (2) for the purpose of Section 1499.11 and 1499.13 of this General Maximum Price Regulation a sale at retail shall not include any sale to the United States, any other government or any of its political subdivisions, any religious, educational or charitable institution, any institution for the sick, deaf, blind, disabled, aged or insane, or any school, hospital, library, or any agency of any of the foregoing."

This language clearly indicates that sales to public and private institutions are sales at retail except for the purposes of the two specified Sections. By providing that persons making sales to private and public institutions are not to be regarded as selling at retail under Section 1499.11, the Administrator grants such persons the right to file their base period record statements with the appropriate field office of the Office of Price Administration. By providing that persons selling to private and public institutions are released from the provisions of Section 1499.13, the respondent has released such persons from certain re-

quirements of marking, posting and filing price lists. Since in only these two respects are sales to private and public institutions released from the general definition of "retail sales" it seems clear that in all other respects such transactions should be regarded as sales at retail. *Expressio unius est exclusio alterius.*

Finally, we submit to the Court that the record in this case is crucially silent in that there is no showing that the sales from Mercantile to Mannie or from Mannie to Texcott resulted in a single penny excess charge to the consumer. The respondent concedes that both Mercantile and Mannie could have sold directly to the private and public institutions and by so doing been in performance of a recognized distributive function. (T. 52) But the respondent did not even attempt to prove that the route the goods took from Mercantile to Mannie to Texcott to the private and public institutions resulted in anything more than a division of a permitted mark-up among these various companies.

In other words, the Court is asked to destroy and disrupt the manner of doing business established innocently by the petitioners and in good faith and carried on without any intent to circumvent or evade the Price Control Act where (1) the Act expressly forbids the exercise of the respondent's powers to revamp an established manner of doing business, where (2) the respondent relies on regulations which are vague, indefinite and uncertain as to meaning, and where (3) there is not the slightest evidence of injury to the price control program.

We urge that the judgment of the Trial Court that Mercantile's sales to Mannie and Mannie's to Texcott were not in performance of a recognized distributive function was erroneous and should be reversed.

III.

Assuming, as we do, that Mercantile's sales to Mannie and Mannie's sales to Texcott were in performance of a recognized distributive function, and, in the case of Mannie, that Mannie's sales to Texcott were really sales to a retailer, the Court below erred in issuing an injunction against the petitioners for violations of RPS 35, RPS 89 and MPR 118. This is true because, as we have seen, these regulations only apply in the event the sales in question are not made in performance of a recognized distributive function; otherwise the GMPR applies.

There remains, however, the question of the propriety of the Court's injunctional order with respect to MPR 127 and GMPR. Even where violations of the Act are shown, the issuance of an injunction is not mandatory upon the Court but is a matter of discretion to be measured by the standards of public interest and not by the requirements of private litigation. *Hecht Co.* v. *Bowles*, 321 U. S. 21, 88 L. ed. 754. *Bowles* v. *Arlington Furniture Co.*, 146 F. (2d) 467 (7th Circuit). In the *Arlington* case this Court held that the issuance of an injunction where there was an honest difference of opinion as to the proper interpretation of a regulation and where there was no reasonable apprehension of further violations, was an abuse of discretion, the Court commenting: "The Administrator's effort to justify the injunction is anything but impressive." (Page 473)

The evidence in the case at bar discloses that Mercantile made sales of bleached duck to Mannie (Respondent's Exhibits 8, 10; T. 48) and that Mannie made sales of bleached duck to Texcott. (Respondent's Exhibits 15, 16; T. 80, 81) Until the investigation which resulted in this proceeding, the defendants mistakenly assumed and believed that the

prices for bleached duck were fixed by the GMPR. (T. 45) Actually the defendants' sales of bleached duck were subject to MPR 127. Sections 1400.81(a)(3) and (4) and 1400.82(i) (1) provide as follows:

> "(3) 'Class I purchaser' includes an export merchant, foreign purchaser or agent of a foreign purchaser, any agency of the federal government, any agency of a state, county or municipal government, a cutter, manufacturer, converter-jobber, jobber or wholesaler (except as provided in subparagraph (4) of this paragraph), and any similar class of purchaser not specifically enumerated herein.
>
> "(4) 'Class II purchaser' includes a retailer (whether independent retailer, chain store or mail order house), private hospital or other similar private institution, hotel, steamship company, canvasser, tailor supply store, tailor trimming store, decorative goods jobber, interior decorator, milliners' supply house, dressmakers' supply house, custom shirtmakers' supply house, and any similar class of purchaser not specifically enumerated herein.
>
> "(i) Wholesalers and jobbers—1 . . . the maximum price for finished piece goods sold in the performance of a recognized distributive function by a wholesaler, jobber or converter-jobber selling jobbed goods, shall be computed by dividing the actual cost by .83 if the sale is to a Class II purchaser and by dividing the actual cost by .88 if the sale is to a Class I purchaser."

From the above provisions, it can be seen that MPR 127 provides for Class I and Class II purchasers and that a wholesaler engaged in the performance of a recognized distributive function is permitted a specified mark-up, depending upon the class of purchaser to whom he makes a sale. As we have previously noted, a wholesaler not engaged in the performance of a recognized distributive function would not be entitled to this mark-up and would be limited to the manufacturer's ceiling price.

Assuming that the petitioners were engaged in a recognized distributive function, has either of them violated MPR 127? The record is clear that the petitioners sold the bleached duck under the assumption that the ceiling price therefor was established by the GMPR, but the record does not disclose that the prices which Mercantile charged Mannie or Mannie charged Texcott for the bleached duck were in excess of the ceiling prices established by Section 1400.82(i)(1) of MPR 127. As a matter of fact, the respondent did not introduce into the record petitioner Mercantile's cost for the bleached duck and, in consequence, it is impossible to ascertain what the MPR 127 ceiling price would be. Thus, it is clear that there is no evidence whatever upon which to predicate a judgment that the petitioners sold in excess of the ceiling prices established by MPR 127.[29] (T. 118)

The petitioners concede, however, that because of their belief that the transactions in bleached duck were covered by the GMPR, the more extensive and detailed records required by Section 1400.75 of MPR 127 were not kept, nor did they invoice their sales of bleached duck as specified by Section 1400.77 of MPR 127. (Respondent's Exhibits 8, 10, 15, 16) However, it is submitted that the failure to keep the required records or furnish the required invoices does not adequately warrant the injunctional order. The attention of the Court is called to the fact

29. This and other findings of fact are in the main so general and undetailed as to fall far short of the standard set by this Court in *Bowles* v. *Russell Packing Co.*, 140 F. (2d) 354. In that case this Court said at page 355 of the opinion: "... We think that in dealing with such drastic legislation, passed to meet a critical situation in our wartime economy, it is imperative that we have the most clear and explicit findings so as to enable us to review with as much care and precision as possible the action the Courts may take in the application of such extraordinary legislation. ... We think it proper to insist at all times upon fair compliance with Rule 52(a)."

that Manuel Fefferman, one of the owners of Mercantile, was advised in connection with the investigation of the records of Mannie by one of the attorneys in the Metropolitan OPA office in Chicago that he had established his prices correctly under the GMPR and was told to continue to do business as he had. (T. 94) It is not claimed that the Government is estopped from thereafter requiring the petitioners to comply with the record-keeping and invoicing requirements of MPR 127. It is earnestly urged, however, that, if a businessman is advised by the Government to continue to keep records in a certain way and to conform to certain ceiling prices, the issuance of an injunction is not proper or necessary to restrain the businessman from doing the very thing that the Government advised him to do, unless the evidence discloses an unwillingness on the part of the businessman to comply with the proper regulation when requested to do so. In the instant case there is abundant evidence to show not only the willingness but also the eagerness of the petitioners to comply with the price control regulations applicable to their businesses. That they had difficulty is understandable in view of the vertiable deluge of misleading, incorrect and conflicting information furnished them by representatives of the Office of Price Administration whose function it was to determine the applicable regulations and to prosecute violations in appropriate cases.

The first investigation of Mannie occurred in September, 1943, when an investigator named Mr. Fishman investigated the company's books and records. Mr. Fishman told Manuel Fefferman, who looked after his wife's interests in Mannie and was one of the partners in Mercantile, that he would hear from an OPA attorney within the next ten days or so. About ten days later Manuel Fefferman received a telephone call and was told to come to the

office of Miss Banahan, an OPA attorney. Mr. Fishman and Miss Banahan were present at this conference. Manuel Fefferman asked them, "What did I violate? What did I do wrong?" to which they responded, "No, we are here to help you; we don't see anything wrong. Just keep operating the same way." (T. 94-95)

Some months later Mr. Cyrus Walker, an OPA investigator, made an extensive investigation of the records of both Mannie and Mercantile. Mr. Walker advised them that MPR 127 had been violated. (T. 95) Mr. Walker, after checking the records of Mercantile, told Meyer Fefferman that Mercantile had violated MPR 127 and enumerated several items, including blue denim and chambray. (T. 119) Later Meyer Fefferman learned that this information was incorrect. (T. 119)[30]

Mr. Walker also told Mr. Meyer Fefferman that he had the right to sell the goods to Mannie providing the permitted mark-up was not exceeded by either of the two companies.[31] (T. 116) Mr. Walker also told Meyer Fefferman that bed sheets were a commodity item "to be treated like a pair of shoes," and that they were subject to a General Maximum Price Regulation.[32] (T. 116) Mr. Walker also told Mr. Meyer Fefferman that MPR 118 did not apply to him because it was a manufacturers' regula-

30. On the assumption that the sales from Mercantile to Mannie are not in the performance of a recognized distributive functiton, the respondent now maintains that the sales of blue denim are subject to RPS 35.

31. Respondent now maintains that this information was erroneous because the transactions between Mercantile and Mannie were not in the performance of a recognized distributive function.

32. This information too is now at odds with the respondent's position because it is claimed that the bed sheets were subject to RPS 35 in that the sale from Mercantile to Mannie was not in the performance of a recognized distributive function.

tion.[33] (T. 117) Until the visit of Mr. Walker, the petitioner Meyer Fefferman had never heard of Regulation 127, 118 or 35. (T. 117)

As evidence of the zeal of the petitioners to comply with the OPA regulations, after Mr. Walker had left Mercantile, Manuel Fefferman and Meyer Fefferman called upon Mrs. Katherine Johnson,[34] enforcement attorney of the Office of Price Administration. Meyer Fefferman told her that Mr. Walker had stated that Regulation MPR 127 had been violated. Mrs. Johnson replied "that many people never heard of Regulation 127, and I should not lose too much sleep about it." She also stated that when Mr. Walker brought in his report she would get in touch with him. (T. 117) Thereafter an investigator by the name of Moore was sent to check Mercantile's ledger, prepare a trial balance and inspect the company's cancelled checks and sales. Several weeks later a Miss Rosen and a Mr. Agron came into Mercantile. They asked for Mercantile's books and inventory. At a later time, in April or May of 1944, Miss Rosen told Manuel Fefferman for the first time that "I can't sell to Mannie & Co. because it does not advance the stage to another function." (T. 118) She also told him to disregard what Mr. Walker had advised him to do. (T. 119)

After Mr. Walker's visit Mercantile's sales of bleached duck were in conformity with the requirements of Regulation MPR 127. (T. 121)

Later Mrs. Johnson telephoned Manuel Fefferman and told him to come over to her office. He complied, and met

33. Quite contrarily, respondent now contends that petitioner Mercantile's sales to Mannie are under MPR 118 with respect to unbleached duck because the transactions between Mercantile and Mannie were not in the performance of a recognized distributive function.

34. Mrs. Johnson represented the respondent in the trial below.

with Mrs. Johnson and Mr. Walker. Mr. Walker, in the presence of Mrs. Johnson, said that the petitioners had violated MPR 127, Mannie & Co. "$5,000 worth" and Mercantile Trading Company "$1,000 worth." Mrs. Johnson then stated "You are in very bad trouble and you better get an attorney at once." Notwithstanding that numbers of investigators had worked on the case, up to this time a claim of violation was not made as to any other Regulation. (T. 97)

After this last conference, a lawyer by the name of Marshall McMahon and Manuel Fefferman conferred with three representatives of the Office of Price Administration in Washington with the idea of straightening the matter out and determining what he should do to comply with the Regulations. The representatives of the OPA told Mr. McMahon and Mr. Manuel Fefferman "that they have not seen a case like this before and that they could get around this by having Mercantile Trading Company invoice Mannie & Co. for cost and charge Mannie a commission for doing the buying." When this conference was reported to Stanford Clinton, counsel for petitioners, he advised the petitioners to wait until the Court ruled on the matter. (T. 87, 88)[35]

Nothing could be clearer than this record to show (1) the petitioners were anxious to do what the law required them to do; and (2) that the OPA gave a series of conflicting and erroneous opinions to the petitioners so that it was impossible for them to determine just what was required of them by the respondent's representatives from time to time. In consequence, we submit that in the exercise of a sound discretion the Trial Court should not

35. Counsel for the petitioners feel constrained to comment that such a commission arrangement might well be deemed a subterfuge.

have issued an injunction with respect to the invoice and record keeping provisions of MPR 127.[35]

It is also contended that the record does not afford any basis for issuing injunctions against the petitioners in so far as the GMPR is concerned. In the case of Mercantile it should be noted that question was raised most belatedly. The original complaint did not charge Mercantile with the violation of GMPR (T. 89). Over the objection of the petitioners the respondent was permitted almost two months after the taking of evidence had been concluded to amend the complaint charging Mercantile with the violation of GMPR. (T. 23, 126, 127) We submit that the Court erred in permitting the amendment.

In the first place, as has been pointed out above, the respondent made prolonged and numerous investigations of the petitioner Mercantile's operations and methods of doing business. Notwithstanding this, the complaint which was filed did not charge Mercantile with any violation of GMPR. In consequence, Mercantile was entitled to assume that the respondent had found no fault with the company's sales of goods subject to the GMPR. Moreover, the case was tried, in so far as Mercantile was concerned, on the theory that Mercantile had not violated GMPR. For example, while the respondent introduced the petitioner Mannie's GMPR price list in evidence, (Respondent's Exhibit 1) the petitioner Mercantile's GMPR price list was not introduced in evidence. In the course of the trial Mrs. Johnson, counsel for respondent, asked counsel for the petitioners if he was going to offer Mercantile's General Maximum Price List in evidence. Counsel for the petitioners replied "I don't think it is in the case. You are not proceeding on the basis that he (Mercantile) violated

35. The record significantly does not show that the petitioners failed to comply with these requirements upon being notified to do so by the respondent's representatives.

GMPR." Mrs. Johnson replied "That is all right. I don't particularly need it." Mr. Clinton then said "Your case is that he is not under GMPR," to which Mrs. Johnson made no reply. (T. 49)

To permit the issue of Mercantile's violation of the GMPR to be injected into the case after the completion of the trial, when counsel for the petitioner Mercantile not only had no opportunity to present a defense and where examination of the witnesses by Mercantile's counsel proceeded on the assumption that Mercantile was not charged with the violation of GMPR, is violative of the most fundamental conception of a fair trial. This is not a case of the injection of new issue which surprises opposing counsel upon trial. This is a case of the injection of a new issue long after the completion of the taking of the evidence. Moreover, by permitting an amendment on April 12, 1945, of a complaint which had been filed on August 18, 1944, the Court deprived the petitioner Mercantile of the defense of the statute of limitations of one year prescribed by the Act. (Sec. 925(e) of the Act.) The effect of the amendment was to revive the liability of Mercantile for any violation Mercantile might have committed in the nine-month period which in the absence of the amendment would have been barred by the statute of limitations. In allowing the amendment the Court below committed obvious error.

In any event, an examination of the record does not disclose proof that petitioner Mercantile violated the GMPR either in the prices it charged for merchandise subject to the GMPR or in the records that it maintained. The whole of respondent's charge that petitioner Mercantile violated the GMPR is nothing more than a matter of conjecture and argument. There are simply no facts in the record which support respondent's position. Not only is there no

evidence of what Mercantile's ceiling prices under the GMPR were, but there is no evidence of a single sale by Mercantile in excess of Mercantile's ceiling prices. On the contrary, there is positive testimony that all sales by Mercantile under the GMPR were at ceiling or less. (T. 65) Yet the Trial Court, without specifying or identifying a single transaction, entered a finding of fact that Mercantile had violated the provisions of GMPR by selling various textiles in excess of the maximum prices fixed and determined therefor by the GMPR! (T. 131) Nor does the record afford any support to the contention that Mercantile violated the GMPR in that the company failed to keep adequate and correct base-period statements required by Section 1499.11, or records which showed as precisely as possible the manner in which they computed their maximum prices as required by Section 1499.12. Sections 1499.11 and 1499.12, in so far as pertinent here, provide as follows:

> "1499.11. *Base-period records.* Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this General Maximum Price Regulation, shall:
>
> (a) Preserve for examination by the Office of Price Administration all his existing 'records' relating to the prices which he charged for such of those commodities or services as he delivered or supplied during March 1942, and his offering prices for delivery or supply of such commodities or services during such month; and
>
> (b) Prepare on or before July 1, 1942, on the basis of all available information and records, and thereafter keep for examination by any person during ordinary business hours, a statement showing:
>
> (1) The highest prices which he charged for such of those commodities or services as he delivered or supplied during March 1942 and his offering prices for delivery or supply of such commodities or services during such month, together with an appropriate de-

scription or identification of each of such commodity or service; and

(2) All his customary allowances, discounts, and other price differentials."

* * * * *

"1499.12. *Current records.* Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this General Maximum Price Regulation shall keep, and make available for examination by the Office of Price Administration, records of the same kind as he has customarily kept, relating to the prices which he charged for such of those commodities or services as he sold after the effective date of this General Maximum Price Regulation; and, in addition, records showing, as precisely as possible, the basis upon which he determined maximum prices for those commodities or services."

We cannot say too emphatically that there is not a word of testimony in this record which shows or tends to show that the petitioner Mercantile failed to comply with the provisions of these Sections. There is no evidence to show that the petitioner Mercantile failed to preserve for examination the necessary records with respect to the transactions in commodities handled by the company during March, 1942. There is specific evidence that Mercantile prepared a statement of ceiling prices. (T 45) Moreover, it must be presumed that the many investigators of the OPA must have seen this statement and been satisfied with it or the petitioner Mercantile would have been charged with violations in the complaint which was filed. Finally, there is no evidence that the petitioner Mercantile failed to keep and make available for examination by the Office of Price Administration all records of the same kind as the company customarily kept "relating to the prices charged for * * * commodities * * * sold after the effective date of the General Maximum Price Regulation; and in addition,

records showing as precisely as possible the basis upon which * * * (the company) determined maximum prices for those commodities. * * *"

In fine, it may be said categorically that the record does not justify the judgment of the trial court that the petitioner Mercantile violated the GMPR.

Mannie's position with respect to the GMPR is somewhat different. The complaint charged Mannie with violating the GMPR. (T. 6, 8, 9) However, the respondent utterly failed to establish a violation by Mannie except in one insignificant respect. The evidence shows that petitioner's maximum prices were based upon its good-faith offers of merchandise in February and March of 1942. However, since Mannie actually made four deliveries of textiles in March, 1942, the prices at which the particular textiles involved were delivered would be Mannie's ceilings for these textiles rather than the offering prices on Respondent's Exhibit 1. These deliveries are shown by Respondent's Exhibits 18 to 21. For the convenience of the Court, we summarize the effect of these four deliveries of textiles:

Exhibit Number	Textile	Sales Price Per Yard	Offering Price Per Yard	Difference
18	Hickory Shirting	.3098c	.364c	Offering price .0542c per yd. in excess of GMPR maximum
19	Twill	.425c	.435c	Offering price .01c per yd. in excess of GMPR maximum
20	Bleached Sheeting	.2375c	.285c	Offering price .0475c per yd. in excess of GMPR maximum
21	Unbleached Sheeting	.459c	.44c	Offering price .14c per yd. less than GMPR maximum

In other words, of the tremendous number of textiles offered by petitioner Mannie, as set forth in Respondent's

Exhibit 1, due to the deliveries made in March, three were offered in excess of the GMPR ceiling price and one was offered at less than the GMPR ceiling.

The petitioner Mannie of course does not defend this inadvertent violation, but does obviously contend that this standing alone should not warrant the issuance of an injunction. An injunction is not needed. Mannie has indicated at all times not only a willingness, but an anxiety, to comply with the Regulations. As pointed out above, Mannie was expressly told by representatives of the OPA that his GMPR ceiling prices were correct and that he should keep on selling textiles in the same way as he had been doing. If Mannie had been advised to correct his ceiling price list there can be no doubt that the correction would have been promptly made.

Aside from these three textiles—Hickory Shirting, Twill, and Bleached Sheeting—which were offered over ceiling, there is no other evidence of violation by Mannie. Indeed, there is no evidence that Hickory Shirting, Twill and Bleached Sheeting was sold by Mannie in excess of the lawful maximums established by the March deliveries, and again we suggest to the Court that in light of the intensive, prolonged and continuous investigations by the OPA of the petitioner Mannie's business over a period of many months, if such sales had been made, it is reasonable to assume that such evidence would have been introduced in the record.

Conclusion.

The judgment below, we submit is insupportable. In holding that the petitioners were not performing a recognized distributive function, the Court's judgment runs afoul of the plain mandate of Congress that established business practices should not be disturbed. In any event such an interpretation is a distorted, strained application of regulations which in language are vague, indefinite and uncertain.

Moreover, in view of the evidence in this case, for the Court to have issued an injunction for petitioners' clerical irregularities is unwarranted in view of their demonstrated zeal to comply with the applicable regulations and the confusing and often times conflicting directions of the Office of Price Administration. The petitioners have in a very real sense been helplessly and innocently enmeshed in a web of administrative legalisms having nothing whatever to do with the price control program. The result does violence to the most elementary conceptions of law and justice.

Respectfully submitted,

NICHOLAS J. PRITZKER,
STANFORD CLINTON,
Attorneys for Petitioners.

APPENDIX.

Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C. A. App. 1942, as amended (Pub. law No. 729, 77th Cong., 2nd Sess., C. 589):

Section 902 (a):

> Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. . . .

Section 902 (h):

> The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, or changes in established rental practices, except where such action is affirmatively found by the Administrator to be necessary to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

Section 904 (a):

> It shall be unlawful . . . to sell or deliver any commodity . . . in violation of any regulation or order under section 2. . . .

Section 925 (a):

> Whenever in the judgment of the Administrator any person has engaged . . . in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make applica-

tion to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged . . . in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Section 925 (e):

If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge . . . If . . . the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.